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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 221

PHILCO CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY BRIEF OF PETITIONER

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PERRY OF BYRON S. ADAMS, WASHINGTON, D. C.

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In its Brief in Opposition the Government does not contest the taxpayer's construction of the statute involved nor the widespread importance of the proper administration of the statute in the federal excise tax field. The Government admits, in effect, that the Petitioner has been denied due process if the credits made by the Petitioner to its purchasers can be character-

ized as "allowances" within the meaning of the statute involved.[1]

The Government argues that the Petitioner is controlled by the *General Motors*[2] and *Ford*[3] decisions because the Petitioner's facts are essentially similar to the facts in those cases. Thus, if there is a material distinction between the Petitioner's facts and the facts in the *Ford* and *General Motors* cases, it is apparent that the Government's entire argument fails, and it follows that Petitioner should be accorded a review of the Court of Claims' denial of due process.

Petitioner has consistently contended that its facts are not only dissimilar but are directly opposite to those in the *Ford* and *General Motors* cases in every material aspect. This petition for certiorari is not to seek a review of those decisions. In both the *General Motors* and *Ford* cases the Court of Claims found as a fact that no part of the purchase price paid to the manufacturer was returned to the purchaser of articles which proved to be defective. Instead, the Court found that these manufacturers either repaired the defective article or replaced the defective part. Since the manufacturers in those cases retained the full purchase price and the purchasers received exactly the article for which they bargained, the Court held that a price adjustment "by a bona fide discount, rebate, or allowance" had not occurred and hence Section

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[1] Internal Revenue Code of 1939, § 3443(a)(2), 53 STAT. 417.

[2] General Motors Corp., Frigidaire Div. v. United States, 147 F. Supp. 739 and 163 F. Supp. 854, *certiorari denied* 358 U.S. 864 (1958).

[3] Ford Motor Co. v. United States, 156 F. Supp., 554 (1957), *certiorari denied* 358 U.S. 864 (1958).

343(a)(2) was not applicable. This holding is in accord with the long-established rule that the rendering of additional services by the seller does not constitute a price adjustment regardless of the expense he incurs.[1] A price adjustment results only when a portion of the sales price flows back to the buyer.

The Petitioner did return a part of the sales price to the buyer and this material difference between its facts and the facts in the *Ford* and *General Motors* cases is plainly demonstrated in the Government's brief. On page 4, the Government states that the Petitioner has "alleged that upon receipt and inspection of a defective part covered by a warranty, *the taxpayer gave its distributors a credit for the part* without any inquiries as to what the dealer or distributor had done for the retail purchaser." (Emphasis added.) Later, in summarizing its contentions before the Court of Claims, the Brief in Opposition states (p. 4):

> "... accepting the facts set forth in the Barenther affidavit, the taxpayer was nevertheless simply fulfilling its obligations under the warranty *by reimbursing its dealers and distributors for the cost of a defective part.*" (Emphasis added.)

To claim that these facts are similar to those in *General Motors* and *Ford* strains credulity. In the *General Motors* and *Ford* cases, the manufacturer

[1] See Colony, Inc., 26 T.C. 30 (1956), *aff'd* 244 F. 2d 75 (6 Cir.), *reversed on other grounds*, 78 S. Ct. 1033 (1958); Country Club Estates, Inc., 22 T.C. 1283 (1954); Cambria Development Co., 34 B.T.A. 1155 (1936); Birdneck Realty Corporation, 25 B.T.A. 1084 (1932); Milton A. Mackey, 11 B.T.A. 569 (1928); Uvalde Co., 1 B.T.A. 932 (1925); Consolidated Asphalt Co., 1 B.T.A. 79 (1924).

made no discount, rebate or allowance on the taxable sales price, and the original price received by the manufacturer remained unadjusted and unchanged. In the present case, however, the Government brief recognizes that the Petitioner, "upon receipt and inspection of a defective part . . . *gave its distributors a credit for the part.*" It fulfilled its obligations under the warranty "*by reimbursing its dealers and distributors for the cost of a defective part.*" This reimbursement reduced the original purchase price to reflect the reduced value of the defective article. The Petitioner did not retain the original sales price and the purchaser did not receive the sound article for which he had bargained.

This basic distinction between the facts in this case and those in the *General Motors* and *Ford* cases has not only been recognized but has been relied upon by the Government in Revenue Rulings[3] and previous cases involving price adjustments under the statute. Each of these previous cases involved the repair of defective articles with no actual reduction in the purchase price. Here, where, for the first time, the facts show that a taxpayer has returned a portion of the price to his purchaser without making repairs or replacements, the Government, for the first time, denies the validity of the distinction.

The Government's present reliance on the *Ford* and *General Motors* cases to establish that such a distinction is immaterial or illusory is particularly surprising since in those very cases the Government strongly advocated the precise distinction it now disavows. In the

[3] Revenue Ruling 56-231, 1956-1 C.B. 686 (R. 43).

Ford case, the Department of Justice made the following point:

> "The 'part of the price which is refunded or credited' clearly contemplates a partial refund (i.e., a paying back to) or credit (i.e., an amount applied by the manufacturer to the credit of the article) to a purchaser, with a resulting reduction of the taxable price upon which the manufacturer's excise tax had been computed. Only in that way could the *price* on which the excise tax had been based be readjusted, and only on the basis of such price readjustment could a proportionate amount of tax refund or credit be determined. A manufacturer's readjustment of a defective article sold, without an actual change in the taxable selling price of the article, obviously cannot comply with statutory requirements."[6]

In the *General Motors* case, the Government's argument was no less explicit:

> "The Council argues that a manufacturer's price is readjusted, by means of an allowance, whenever the manufacturer, after the sale is completed, returns to the purchaser '(a) cash, (b) credit, (c) articles of value, or (d) services of value.' The Government would certainly take no issue with (a) and (b), since clearly both would result in a change in the purchase price on which the excise tax had been computed."[7]

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[6] *Motion of the Defendant for Judgment on the Pleadings and Brief in Support Thereof*, p. 13, Ford Motor Company v. United States, (U. S. Court of Claims, No. 231-56), *supra* note 3.

[7] *Government's Reply to Brief of Amicus Curiae*, p. 3, General Motors Corporation, Frigidaire Division v. United States, (U. S. Court of Claims, No. 55-56), *supra* note 2.

Again before the Court of Claims, the Department of Justice very succinctly stated in its brief:

> "If a manufacturer, having delivered a defective article to a purchaser, should actually compromise and reduce the price which the purchaser had paid for the article or contracted to pay, by way of compensating the purchaser for the defect in the equipment purchased by him, such action would clearly constitute a readjustment of the price by way of a bona fide rebate or allowance within the intendment of Section 3443(a)(2) of the Code. The repair or replacement of a defective part of an article sold, in order to provide the purchaser with that for which he had contracted does not appear to involve in any way a readjustment of the price paid for the article."[8]

Having won those cases on the basis of the distinction, it is inconceivable that the present case should be summarily dismissed on the ground that the distinction is unimportant. The Government's present attempt to ignore this fundamental distinction must not divert the Court's attention from the real issue involved in this case.

In arbitrarily and summarily denying relief under Section 3443(a)(2), the Court of Claims has deprived the Petitioner of its property without due process of law. The court has established a conclusive presumption that if a price is readjusted by reason of a rebate or allowance it is not a "price . . . readjusted by reason of . . . a rebate or allowance"[9] under the statute if the

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[8] *Government's Brief in Opposition to Plaintiff's Motion for Summary Judgment*, p. 4, International Telephone and Telegraph Corporation v. United States, U. S. Court of Claims, No. 62-56, unreported.

[9] Internal Revenue Code of 1939, § 3443(a)(2), 53 STAT. 417.

motive is to satisfy the purchaser of a defective article. This holding strips the statutory provision of all meaning and amounts to a judicial veto of unambiguous tax relief provisions enacted by Congress.

There is no dispute that this case involves a vitally important area of the federal tax laws and since there is no normal appellate procedure from Court of Claims' decisions, the exercise of this Court's supervisory powers is essential.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted as prayed.

Respectfully submitted,

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